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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

WILLIAM DOUGHERTY, Plaintiff and Respondent, v. NANCY BALLES, A Professional Law Corporation et al., Defendants and Appellants.	A140722 (Contra Costa County Super. Ct. No. MSC13-00807)

I.

INTRODUCTION

This action was filed against attorney Nancy Balles, A Professional Law Corporation, and Nancy Balles (collectively Balles) by her former client William Dougherty (plaintiff), alleging malpractice, fraud, and breach of fiduciary duty in connection with Balles's representation of plaintiff in his employment case (the underlying action). After plaintiff filed this action, Balles filed a special motion to strike under Code of Civil Procedure section 425.16, the anti-SLAPP statute.[1] The trial court

[1] Subsequent statutory references are to the Code of Civil Procedure. Section 425.16 was enacted in 1992 to provide a procedure for expeditiously dismissing "nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue. [Citation.]" (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 235.) This type of suit, referred to under the acronym SLAPP, or strategic lawsuits against public participation, is generally brought to " 'deter common citizens from exercising their political or legal rights or to punish them for doing so,' " not to vindicate a legally cognizable right of the plaintiff. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 927.)

struck the allegations in plaintiff's complaint involving Balles's filing of a notice of attorney's lien for the reasonable value of her services to plaintiff in the underlying action, which the court found was protected activity under the anti-SLAPP statute. However, after doing so, the court denied the anti-SLAPP motion and allowed plaintiff's case to proceed. Balles appeals, claiming the trial court should have granted the anti-SLAPP motion and struck plaintiff's complaint in its entirety.

After conducting our de novo review, we conclude plaintiff's claims do not arise out of Balles's filing a notice of attorney's lien, or any other protected petitioning activity. To the contrary, plaintiff's claims arise out of his dispute with Balles over the value and quality of the legal services she provided plaintiff in the underlying action. Because plaintiff's claims do not involve protected activity, the anti-SLAPP statute does not apply and it was unnecessary for the court to strike any allegations from plaintiff's complaint. Therefore, we affirm the order denying Balles's anti-SLAPP motion, but vacate the portion of the court's order striking the allegations referring to the notice of attorney's lien.

II.

FACTS AND PROCEDURAL HISTORY

On September 27, 2005, plaintiff hired Balles to represent him on an ongoing hourly basis in regard to a wrongful termination and age discrimination case against his former employer, Sears Roebuck & Company (Sears). Balles undertook considerable efforts to reach a settlement without litigation; but Sears refused even to negotiate.

On November 8, 2005, as the deadline to file suit was fast approaching, Balles filed the underlying action on plaintiff's behalf and with his approval. (*Dougherty v. Sears* (Super. Ct. Contra Costa County, 2005, No. MSC 05-02335).) Their "Legal Services Agreement" was amended after the lawsuit was filed to reflect the filing of the lawsuit. Plaintiff signed the amendment on December 2, 2005.

As the initial trial date in the underlying action approached, Balles sought out Lawrence Organ (Organ) to join as lead trial counsel. Over the next three and a half

months, Balles, Organ, and plaintiff negotiated the terms for a contingency fee agreement, which plaintiff signed on October 5, 2007.

Balles remained involved in the underlying action, up to and including the four-week jury trial. On April 19, 2010, on the eve of the jury's verdict, plaintiff sent Balles a one-sentence fax terminating her as his lawyer. On April 20, 2010, the jury returned a verdict in favor of plaintiff, finding Sears liable for age discrimination, and awarding him economic damages of $67,218. On May 21, 2010, Balles filed a notice of attorney's lien in the underlying action to protect her right to attorney fees for work performed in the underlying action. An amended notice of lien was subsequently filed on June 17, 2010.

Plaintiff filed an appeal from the judgment in the underlying action challenging the trial court's grant of nonsuit on the issue of punitive damage liability at the close of plaintiff's case-in-chief. Plaintiff's appeal also challenged the trial court's granting of Sears's motion for judgment notwithstanding the verdict (JNOV). On April 19, 2012, in a nonpublished opinion, Division Two of this appellate district reversed the JNOV, reinstated the jury's verdict, and reversed the order granting nonsuit on the issue of punitive damages. (*Dougherty v. Sears Roebuck and Co.*, No. A129652.)

Plaintiff filed the instant lawsuit against Balles on April 19, 2013. The complaint alleged nine causes of action, including intentional misrepresentation, fraud, negligent misrepresentation, professional negligence, unfair business practices, intentional interference with economic advantage, breach of contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty. The allegations common to all of these causes of action basically claimed Balles's representation in the underlying action "fell below the standard of care for an attorney practiced in employment law," and alleged she is attempting to collect "an unconscionable fee" that is "well in excess of the value of any services that [Balles] provided."

Balles filed an anti-SLAPP motion on August 12, 2013. Balles claimed "all nine causes of action herein, arise from [Balles's] filing a Notice of Lien [for her attorney fees] in the underlying action . . . ." She argued that the filing of her notice of attorney lien was "squarely covered" by the anti-SLAPP statute and "this action is about

expunging [Balles's] lien and retaliating against [her] protected activity."[2] Plaintiff filed opposition claiming "[d]efendant's act of filing a lien is, at best, merely incidental or collateral" to the causes of action plead against Balles and merely "provide a bit of context for the Court of all the events in this tortured procedural history." (Italics omitted.)

After concluding the "filing of the lien was a protected activity" pursuant to the anti-SLAPP statute, the trial court shifted the burden to plaintiff to show a likelihood of prevailing "but only as to any claims involving the lien." The trial court then struck the allegations in plaintiff's complaint concerning the filing of the notice of the attorney's lien after finding plaintiff's claims regarding the unconscionability of the attorney fees was time barred by the one-year statute of limitations. (§ 340.6.) In all other respects, the court denied Balles's anti-SLAPP motion. Balles timely appealed.

III.

DISCUSSION

A. The anti-SLAPP Statute

When served with a SLAPP, a defendant may immediately move to strike the complaint under section 425.16. To determine whether this motion should be granted, the trial court must engage in a two-step process. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76 (*City of Cotati*).)

The court first decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" protected activity. (*City of Cotati*, *supra*, 29 Cal.4th at p. 76.) The moving defendant must demonstrate that the act or acts

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[2] Section 425.16, subdivision (e) provides in pertinent part: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . ."

of which the plaintiff complains were taken "in furtherance of the [defendant's] right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . ." (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).)

If a defendant satisfies this burden, the plaintiff must produce evidence sufficient to establish a prima facie case of prevailing on the complaint. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741 (*Jarrow Formulas*).) The plaintiff bears the burden of proof at this stage, which is akin to an opposition to motions for nonsuit, directed verdict, or summary judgment. (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26.) As with opposition to a summary judgment motion, a plaintiff may not rely on the allegations of the complaint to oppose a special motion to strike, and instead must produce competent admissible evidence. (*Schoendorf v. U.D. Registry, Inc.* (2002) 97 Cal.App.4th 227, 236.) A defendant, however, has the burden of proof to establish an affirmative defense to the action. (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 969 (*Seltzer*).)

"An order denying a special motion to strike under section 425.16 is immediately appealable. [Citations.] Our review is de novo; we engage in the same two-step process as the trial court to determine if the parties have satisfied their respective burdens. [Citations.]" (*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490 (*Castleman*).) The anti-SLAPP motion will not be granted unless both prongs of the statute are established; the plaintiff's cause of action must arise from protected speech or petitioning and lack even a minimal degree of merit. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819–820.)

B. Notice of Attorney's Lien

The dispositive issue in this appeal is whether Balles met her burden to show plaintiff's causes of action arose from protected activity. If Balles failed to make that showing, the anti-SLAPP statute does not apply and the trial court should have denied Balles's motion without striking any allegations, or considering the merits of plaintiff's claims. (*Clark v. Mazgani* (2009) 170 Cal.App.4th 1281, 1286; *Castleman*, *supra*, 216

Cal.App.4th at p. 490; *Talega Maintenance Corp. v. Standard Pacific Corp.* (2014) 225 Cal.App.4th 722, 728.) Here, Balles claims she "met her initial burden by showing that each and every cause of action arose from her protected activity, which was the filing of the notice of [attorney's] lien."

" 'A lien in favor of an attorney upon the proceeds of a prospective judgment in favor of his [or her] client for legal services rendered . . . may be created either by express contract . . . [citations] or it may be implied if the retainer agreement between the lawyer and client indicates that the former is to look to the judgment for payment of his fee [citations].' [Citation.]" (*Brown v. Superior Court* (2004) 116 Cal.App.4th 320, 327 (*Brown*).)

" 'Unlike a judgment creditor's lien, which is created when the notice of lien is filed [citation], an attorney's lien is a "secret" lien; it is created and the attorney's security interest is protected even without a notice of lien. [Citations.] An attorney may, however, choose to file a notice of lien in the underlying action, and the common practice of doing so has been held permissible and even advisable.' [Citation.]" (*Brown*, *supra*, 116 Cal.App.4th at p. 327.) However, the failure to file a notice of lien does not affect the lien's validity. (*Carroll v. Interstate Brands Corp.* (2002) 99 Cal.App.4th 1168, 1172–1173 (*Carroll*).)

An attorney's lien survives the attorney's discharge and continues to entitle the attorney to recover his or her fee from the client's recovery. (*Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 50, fn. 11; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 598 (*Weiss*).) But, "where an attorney has been discharged (with or without cause) by a client with whom the attorney had a contingent fee agreement, upon occurrence of the contingency specified in the agreement, the attorney is limited to a quantum meruit recovery for the reasonable value of his [or her] services rendered to the time of discharge." (*Weiss*, at p. 598; see also *Fracasse v. Brent* (1972) 6 Cal.3d 784, 786.)

After the client obtains a judgment or settlement in the underlying action, a discharged attorney must bring a separate, independent action to establish the existence of the lien, to determine its amount, and to enforce it. (*Mojtahedi v. Vargas* (2014) 228

Cal.App.4th 974, 977-978 [attorney's lien is only enforceable after the attorney adjudicates the value and validity of the lien in a separate action against his or her client]; *Brown*, *supra*, 116 Cal.App.4th at p. 328; *Carroll*, *supra*, 99 Cal.App.4th at p. 1173.)

For these reasons, Balles could not simply intervene in the underlying action and claim the court should pay her the funds subject to the attorney's lien against plaintiff, her former client. Indeed, the trial court in the underlying action has no jurisdiction to determine the existence, validity, or amount of the lien, and " '[a]n order within the underlying action purporting to affect an attorney's lien is void.' [Citation.]" (*Brown*, *supra*, 116 Cal.App.4th at p. 328; *Carroll*, *supra*, 99 Cal.App.4th at p. 1173.)

Therefore, notwithstanding the filing of the notice of attorney's lien, Balles still will be required to establish the existence, amount, and enforceability of her lien on any recovery obtained by plaintiff. We are told that "[i]n this case, despite Balles filing a notice of lien over four years ago, she has not filed any litigation—or more accurately, a request for arbitration pursuant to the fee agreement—to determine the existence and/or validity of the lien."

C. The "Arising From" Requirement

The first step of this court's de novo analysis is to determine whether Balles has made a threshold showing that the challenged cause of action is one "arising from" protected speech or petitioning activity. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477.) As already noted, Balles claims "[t]his case and all nine causes of action herein, arise from [her] filing a Notice of Lien in the underlying action *Dougherty v. Sears* . . . ."[3] Therefore, Balles argues, the anti-SLAPP statute applies here because plaintiff's complaint is trying to stifle Balles's petitioning activity protected by the anti-SLAPP statute. Balles misconstrues both the bases for plaintiff's claims, and the scope of the anti-SLAPP statute's protection for petitioning activities.

[3] We note that in arguing plaintiff's claims arise out of protected petitioning activity, Balles does not differentiate between any of plaintiff's causes of action, but rather deals with them as a collective whole. Accordingly, in analyzing the "arising from" requirement, we also will not differentiate the various claims and will focus on those claims as a whole.

Balles cannot meet her burden to show plaintiff's complaint included a "cause of action . . . arising from" protected activity simply by showing petitioning activity was part of the "evidentiary landscape" within which the claims arose. (§ 425.16, subd. (b)(1); *Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272 (*Hylton*).) To determine whether the claims made in plaintiff's complaint arise from protected acts, we " 'examine the *principal thrust* or *gravamen* of . . . [the] cause[s] of action to determine whether the anti-SLAPP statute applies' . . . ." (*Hylton*, at p. 1272; *Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 519–522.)

"We assess the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.' [Citation.]" (*Hylton, supra*, 177 Cal.App.4th at p. 1272.) We must bear in mind that "the mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. [Citation.] Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such. [Citation.]" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) "In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Ibid.*, original italics.) If the cause of action does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger anti-SLAPP protection. (*Hylton*, at p. 1272.)

D. Plaintiff's Causes of Action Do Not Arise from Protected Activity

Plaintiff claims "[Balles's] filing of a notice of lien is not an element of any claim or defense at issue in this case[;] it, at best, constitutes incidental protected conduct, which does not qualify for protection under the anti-SLAPP statute." We agree.

Courts have consistently held "that actions based on an attorney's breach of professional and ethical duties owed to a client are not SLAPP suits, even though protected litigation activity features prominently in the factual background. [Citation.]" (*Castleman, supra*, 216 Cal.App.4th at p. 491.) For example, the anti-SLAPP statute has been held not to apply to claims against a former attorney based on legal malpractice or

breach of fiduciary duty (*Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 627; *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1189; *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1540; *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 702.) Likewise, the anti-SLAPP statute has been held not to apply to an action against a former attorney who chooses to align himself with the former client's adversaries, triggering claims the attorney breached duties of loyalty and confidentiality owed by virtue of the prior attorney/client relationship. (*U.S. Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton LLP* (2009) 171 Cal.App.4th 1617, 1628-1629; *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1228; *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 732.) The same may be said of a cause of action alleged against a former attorney for conspiracy to commit fraud which allegedly deprived the client of the representation for which they had retained the attorney. (*Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566, 580-582.)

We believe the instant case also is similar to *Hylton*, *supra*, 177 Cal.App.4th 1264. Hylton sued his former attorney, whom he had hired in connection with a wrongful termination action, alleging the former attorney had breached his fiduciary duty to Hylton by attempting to extract an excessive fee. (*Id.* at p. 1269.) The attorney's actions allegedly included making false statements to Hylton about Hylton's ownership in company stock, and ultimately inducing Hylton to settle the case, thus triggering a contingency fee that was based on the amount of stock Hylton retained. (*Ibid.*) The former attorney filed a special motion to strike, claiming section 425.16 applied because the action was based on the attorney's protected petitioning activity, to wit: "[T]he complaint sought to pursue claims that arose from statements made before a judicial proceeding or in connection with an issue under consideration by a judicial body, and therefore the underlying conduct constituted protected petitioning activity within the meaning of the anti-SLAPP statute." (*Id.* at pp. 1269–1270.)

The appellate court disagreed. The court indicated no pertinent authority had been cited "suggesting a client's action against his or her attorney, whether pleaded as a malpractice claim, a breach of fiduciary duty claim, or any other theory of recovery, is

subject to the anti-SLAPP statute merely because some of the allegations refer to the attorney's actions in court." (*Hylton*, *supra*, 177 Cal.App.4th at p. 1275.) Instead, the court concluded that "Hylton's claims allude to [the attorney's] petitioning activity, but the gravamen of the claim rests on the alleged violation of [the attorney's] fiduciary obligations to Hylton by giving Hylton false advice to induce him to pay an excessive fee to [the former attorney]." (*Id*. at p. 1274.) That is, "[a]lthough petitioning activity is part of the evidentiary landscape within which Hylton's claims arose, the gravamen of Hylton's claims is that [the former attorney] engaged in nonpetitioning activity inconsistent with his fiduciary obligations owed to Hylton . . . ." (*Id.* at p. 1272.)

The reasoning of *Hylton* applies to this case as well. The central subject of plaintiff's complaint is not Balles's exercise of her right to petition the court by filing a notice of attorney's lien. Instead, the principal thrust or gravamen of the acts complained of in plaintiff's complaint derive from the parties' private dealings with each other as attorney and client, and are based on Balles's professional duties and responsibilities in carrying out that relationship. For example, in plaintiff's negligent misrepresentation and fraud claims, he asserts that Balles "misrepresented that she had adequate experience" to take the case to trial, and "falsely represent[ed] that Plaintiff's economic damages and/or case value was in excess of the amount Plaintiff paid to and/or was indebted" to pay Balles in attorney fees. In his claim for professional negligence, plaintiff claims Balles breached her duty to represent him in the underlying action according to professional standards. In his claims for breach of contract and breach of the covenant of good faith and fair dealing, plaintiff alleges that the parties' contractual fee agreement "was unconscionable in that it provided for Balles to collect an excessive fee."

The rationale employed recently by the Second District Court of Appeal opinion in *Drell v. Cohen* (2014) 232 Cal.App.4th 24 (*Drell*), is consistent with our analysis.[4] In

[4] This case was cited for the first time by plaintiff's counsel at oral argument. Submission was deferred to allow the parties to file supplemental briefs discussing *Drell's* applicability, if any, to this case. Those briefs have now been filed and the case was deemed submitted as of May 15, 2015.

Drell, defendant attorneys withdrew from representing a personal injury plaintiff who hired new counsel. After the case was settled, former counsel contacted the insurer for the personal injury defendant advising it that former counsel had a lien for attorney fees against any recovery by their former client. The insurer then tendered the settlement check including the names of both former and present counsel as payees. Current counsel filed a declaratory judgment action to determine the status of the former counsel's lien. An anti-SLAPP motion was filed by former counsel, who argued that the assertion of a lien was a statement made in anticipation of litigation, and was protected activity. The motion was denied, and the appeal affirmed the trial court's conclusion that the declaratory relief lawsuit did not arise out of protected activity under section 426.16, subdivision (b). (*Drell*, at pp. 26-27.)

While the *Drell* court agreed with former counsel who filed the anti-SLAPP motion that their assertion of a lien for attorney fees was protected activity, the court concluded that the gravamen of the complaint for declaratory relief did not alleged that the lien was wrongful: "Defendants are correct that a demand letter may be protected, but a complaint is not a SLAPP suit unless the gravamen of the complaint is that defendants acted wrongfully by engaging in the protected activity. The complaint here did not allege defendants engaged in wrongdoing by asserting their lien. Rather, the complaint asked the court to declare the parties' respective rights to attorney fees. The complaint necessarily refers to defendants' lien, since their demand letter is key evidence of plaintiff's need to obtain a declaration of rights, but the complaint does not seek to prevent defendants from exercising their right to assert their lien." (*Drell*, *supra*, 232 Cal.App.4th at p. 30, fn. omitted.)

We agree with plaintiff when he argues that Balles's "notice of lien is utterly irrelevant—and non-essential—to each of the elements [plaintiff] must prove to prevail on his causes of action. . . . [T]he fact that [Balles] filed a notice of lien is merely incidental to the actual issues in the case, which form the principal, or gravamen, of [plaintiff's] claims . . . ." Therefore, this is not a case that implicates the anti-SLAPP statute.

When the anti-SLAPP motion was decided below, the trial court came to the identical conclusion as this court, and found the gravamen of plaintiff's complaint was *not* Balles's filing of the notice of attorney's lien. However, the court went on to consider the case on its merits and ordered plaintiff's allegations "concerning the filing of the attorney lien" to be struck from plaintiff's complaint. This was error. Instead, Balles's anti-SLAPP motion should have been denied in its entirety without considering the case on its merits or striking any allegations.[5]

E. Motions for Sanctions

There are two motions filed by the parties that remain to be addressed. On October 1, 2014, Balles filed a motion for sanctions and a request to strike plaintiff's brief, claiming plaintiff failed "to properly cite to matters in the record" and misrepresented "material rulings of the trial court." Plaintiff filed opposition to the motion on October 16, 2014, requesting we order sanctions against Balles for filing a frivolous motion for sanctions. By order filed on October 22, 2014, this court indicated these matters would be decided with the merits of this appeal. (Ruvolo, P. J.)

We exercise our discretion and deny both motions. In conducting our de novo review, we are able to determine from the record what matters were before the trial court in connection with these proceedings. We see no need to issue sanctions or to strike portions of the parties' briefs over this issue. (See *Central Concrete Supply Co., Inc. v.*

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[5] Parenthetically, even in cases where the cause of action targets both conduct protected by the anti-SLAPP statute and unprotected conduct (a mixed cause of action), we do not believe the anti-SLAPP statute authorizes the striking of discrete allegations within a cause of action. We agree with the line of cases which have held that the anti-SLAPP statute authorizes a court to strike a cause of action, but unlike an ordinary motion to strike under section 436, it cannot be used to strike specific allegations within a cause of action. (See, e.g., *A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1124, citing *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308; *Burrill v. Nair* (2013) 217 Cal.App.4th 357, 380-382.) We acknowledge there is case law which supports the partial striking of a cause of action under the anti-SLAPP statute. (See, e.g., *Cho v. Chang* (2013) 219 Cal.App.4th 521, 526–527; *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 772-773.) However, as we have indicated, we agree with the contrary line of cases.

Bursak (2010) 182 Cal.App.4th 1092, 1095, fn. 2 [denying "motion to strike portions of appellant's reply brief that refer to and rely on matters not before the trial court," but "disregard[ing] any such matters not before the trial court"].) We also deny plaintiff's motion for sanctions against Balles, concluding that neither the anti-SLAPP motion, nor this appeal, was frivolous.

IV.

DISPOSITION

The order denying Balles's anti-SLAPP motion is affirmed; however, we vacate the portion of the court's order striking plaintiff's allegations concerning the filing of the notice of attorney's lien. Plaintiff is entitled to his costs on appeal.

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RUVOLO, P. J.

We concur:

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RIVERA, J.

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STREETER, J.